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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Reply Brief for Appellant.

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Reply Brief for Appellant.

MAY IT PLEASE THE COURT:

I.

THE STATUTE AS CONSTRUED AND APPLIED IS INVALID UNDER THE COMMERCE CLAUSE.

(a) Appellant Places an Interpretation Upon the Statute not Placed Upon it by the Wisconsin Court.

In this reply we assume, as we assumed in our original brief, that this Court and the parties hereto, in determin-

ing the constitutionality of the Statute in question (Wis. Stats. 201.[illegible]. Or. Br. 11), are bound, as to its meaning and purpose, by the construction placed upon it by the State Court (*Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, 223; *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 330). When this elemental rule is placed alongside appellee's brief, it becomes apparent that "the fugitive exigencies of the hour" required that this rule be ignored. The question at bar, therefore, is not how Messrs. Riegel and Loman in their book, Insurance Principles and Practices, (Opp. Br. 15, 16) or Professor Huebner in his book, Property Insurance, (Opp. Br. 23), and this with all deference, define generally an unearned premium reserve, but rather how the Supreme Court of Wisconsin defined the meaning and purpose of its unearned premium reserve statute. (*Duel* v. *State Farm Mutual Automobile Insurance Co.*, 240 Wis. 161, 178.)

Particularly is this true in a case where other Wisconsin Statutes provide for reserves for all losses (Wis. Stats. 204.27 and 204.28, App. I, This Reply) and other Wisconsin Statutes (201.03 and 201.32, App. II, Orig. Br. 58) set forth the minimum standard of solvency and Wisconsin Statute 201.50 (Opp. Br. 55) provides a comprehensive sworn annual statement "suitable for eliciting a true and complete exhibit of the financial condition . . . of each company." Under these other statutes, Wisconsin has ample authority to make appellant set up adequate reserves to secure all liabilities, and possess in addition thereto, a minimum surplus of $50,000.00. And particularly is this true in a case where no one claims that appellant does not comply with these other statutes, where the solvency of the Company is well established (Orig. Br. 16, R. 102), where it already carries a surplus of $8,944,982.39 in excess of the minimum requirement of $50,000.00 surplus set forth in the Wisconsin Statutes

(App. II, Orig. Br. 58), and, in addition thereto, a voluntary and unassigned contingent reserve of $4,000,000.00 (Orig. Br. 16, R. 102). Particularly is this true in a case where the maximum additional reserve requirement under Wisconsin doctrine could not exceed $815,103.20 for 1942 (Orig. Br. 15), or approximately 6% of the amount the Company carries voluntarily as surplus and contingent reserve over and above the statutory requirements of Wisconsin. This case, obviously, must be decided in the light of these undisputed facts, as we assume the Supreme Court of Wisconsin decided it, and in the light of which we submit that its opinion should be read.

Much has been said in appellee's brief of the purpose of the statute being to determine the Company's "financial condition and stability" (Opp. Br. 14), that it "is grounded upon protecting the citizens and residents" of its State (Opp. Br. 27), etc. Examination of the Wisconsin opinion discloses no such concurrence. Are we, therefore, to assume that its highest Court was unmindful of these claimed purposes? Certainly not! They were argued there just as they are argued here, and they were rejected as extraneous there as they should be so rejected here. This statute, said the Wisconsin Court, required the designated reserve "to be maintained wholly independent of the company's solvency in the sense that its assets equal its overall liabilities" (R. 138). And why? Because "the statute is so written * * * and as written it must be executed" (R. 138). That Court was "not concerned with the wisdom of the statute, nor with the probability of the company's meeting *the obligations to refund unearned premiums* (emphasis supplied) out of its surplus or its contingent reserve or its other assets." It was concerned only "with carrying out the legislative intent evidenced by it" (R. 139).

What was this legislative intent? It was, as it said in its former opinion construing the purpose and meaning of the Statute "impossible to repel the implication from all this that the amount exacted to cover the cost of insurance shall buy insurance protection which may be so measured *that the unearned portion of the premium deposit may be ascertained and returned*" (240 Wis. 161, 178; emphasis supplied). The legislative intent was, therefore, that the Statute was designed, as we have argued, "to maintain in trust for the exclusive right of the policyholders, a sum equal to the unearned part of the premiums already collected" (Crobaugh, Handbook of Insurance, p. 1131; Orig. Br. 23).

Now, as we said in our original brief (p. 14), the key to the problem lies in the definition of premium. Why? Because a premium must be collected before the Statute can apply by its terms. The reserve is computed "by the commissioner setting up fifty per cent of the *premiums received* on all risks" (Wis. Stats. 201.18; Orig. Br. 11). Does that mean according to Wisconsin its definition of premium as to business transacted there (as the Company concedes), and, to the other states as to business done there, the definition there recognized? It does not, says Wisconsin. It means impressing on business transacted everywhere Wisconsin's definition of premium so that its reserve for unearned premium statute can be superimposed on such business conducted elsewhere to assure "the Company's meeting the obligation to refund unearned premiums" as to business done in other states where both the obligation to return and the presence of premium, according to the laws of those states, is nonexistent!

The statute, as thus construed and applied was held constitutional not because its purpose was to secure "financial condition and stability in the future as well

as the present" (Opp. Br. 14), not for "purposes of determining the company's financial condition and stability" (Opp. Br. 16), not "for the purpose of computing reserves in testing financial soundness and stability" (Opp. Br. 24-25), not for the purpose of "assuring that citizens and residents of Wisconsin who have damage claims against policyholders will be protected by the company having adequate assets to pay the same" (Orig. Br. 26), nor for any Wisconsin purpose or interest stated, legitimate or otherwise. We take the word of the Wisconsin Court that it held the statute constitutional because of its equal operation upon all, because "the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do" (R. 139).

Now, then, if we are correct in these assertions and we submit that we are, it must become immediately apparent that all of appellee's argument must fail as being based upon premises non-existent—premises equally as illusory, if the Court please, as the concept of membership fee being a part of premium in states other than Wisconsin and the existence of a liability there to return a part of such membership fee under any circumstances (Opp. Br. 14, 15, 31).

But we haven't mentioned that the Statute also refers not only to an "unearned premium" but a "reinsurance reserve" (Orig. Br. 11). Neither did the Supreme Court of Wisconsin for the obvious reason that it is but one reserve, the terms being used interchangeably (Crobaugh, Orig. Br. 23) and for the further reason, as anyone familiar with the insurance business well knows, that the alternative purpose of this reserve "the amount necessary for reinsuring the risks" (Crobaugh, Handbook of Insurance, p. 1143, Orig. Br. 23), presents no solvency problem as the

reinsuring company acquires the business without acquisition expense, such as agency commissions, etc., and reinsures only for the remainder of the term and acquires the reserve set up. Especially is this true where the company selling the business has a substantial surplus as at bar. Surplus comes from earnings and, to acquire a surplus, a company must have an adequate rate structure and a profitable underwriting experience. Appellant's surplus, acquired by virtue of its operations since 1922, the date of its inception, conclusively demonstrates the adequacy of its rate structure. Faced with these facts, the Supreme Court of Wisconsin necessarily held that the purpose of its unearned premium reserve statute was to maintain a sum sufficient to discharge the Company's "obligation to refund unearned premiums" (R. 139). Therefore, as we have indicated, the constitutionality of this Statute must be viewed in the light of this construction and none other, namely, a statute designed to secure discharge of the Company's "obligations to refund unearned *premiums*." Appellee virtually concedes that the statute, as thus construed, is "unreasonable and inoperative" (Opp. Br. 13, 14).

(b) Appellee places an incorrect interpretation upon the statute as construed and applied (1) in failing to recognize that it is not an over-all solvency reserve statute but a special reserve statute, limited in purpose and effect, namely, to secure the discharge of a liability to return unearned premiums; and (2) in failing to recognize its extra-territorial application and construction. Thereby he seeks to destroy the life membership fee plan everywhere.

Appellee misconceives both the purpose and application of the statute as construed and applied. This statute is not an over-all solvency reserve statute, but a limited one to

serve the special purpose indicated. It is not meant to perform the function of Wisconsin's capital and surplus statute in determining solvency (Wis. Stat. 201.03 and 201.32, Appendix II, Orig. Brief 58), nor the function of its loss reserve statutes, (Wis. Stat. 204.27 and 204.28, Appendix I This Reply p. 23) to guarantee the payment of losses. It is a statute designed solely to secure the discharge of the company's "obligation to refund unearned premiums" as the Court advised us on two occasions (240 Wis. 161, 178, R. 139).

To argue that "no surplus exists until this reserve has been calculated and given effect as a liability" and when this is done "it may be that it would completely wipe out the asserted surplus and the contingent reserve", and that "this is the very reason the statute requires such reserve to be calculated and shown as a liability", and to conclude that "with this in mind the ridiculousness of saying that this reserve has no pertinency to over-all solvency is obvious" (App. Brief 19) is only to accentuate the misconception. It must be perfectly obvious that there is no purpose in creating a reserve to secure a contingent liability in the absence of a contingent liability. If the company has no "obligations to refund unearned premiums", as to the business upon which this reserve is sought to be based, and it has none, then the absurdity of the argument becomes apparent.

Then to assert that an unearned premium reserve must necessarily "be determined upon a unitary basis" (Opp. Br. 16) nationally is simply to argue that the total is not equal to the sum of its parts and to ignore elemental and universal insurance practice and state requirements. Every insurance company must keep records by states, not only because of state requirement, but also for the obvious reason that it must know whether the business is profitable or unprofitable in each territory. Every company must

and does constantly compare the premiums earned in a given state with the losses incurred in such state. If this were not true, no company would be able to make rates by states. Each financial statement filed by this Company in Wisconsin must show the premium income from each state and the membership fee income from each state and must show the total of these items. Liabilities for unearned premiums are obviously determined by the law of each state. The unearned premium reserve, being designed to secure the liability of the company to return unearned premium, necessarily is based upon the definition of premium in each of the states. Thus, from the financial statement, Wisconsin is able to determine state by state, the unearned premium liability of this or any other company. Texas, Arizona and Louisiana, which do not permit the use of the membership fee plan, have no difficulty in this regard, permitting the Company to operate there unhampered as this record admits. The annual reports on file with the Wisconsin Insurance Commissioner are public records and the subject of judicial notice. For convenience, therefore, we have reproduced pages 9 and 33 of the annual report of this Company on file with appellee for the year 1942 (Appendix II, This Reply 29) to illustrate application of the foregoing.

To buttress his argument that no attempt is made to give the statute extraterritorial effect, appellee says that "this Statute does not say that life membership fees are premiums in other states" (Opp. Br. 38). This is only literally correct inasmuch as the Statute does not mention life membership fees. As construed and applied, however, it does say that premium includes membership fee wherever collected, effectually destroying the concept of membership fee (Orig. Br. 14) and torpedoing the membership fee plan. It is exactly like saying, as New York said in *Baldwin* v. *Seelig*, 294 U. S. 511 (Orig. Br. 20, 21) that it was not interfering with the price of milk in Vermont nor the

importation of such milk into New York. The importer could buy it and drink it, couldn't he? Likewise, Wisconsin is not interfering with our membership fee in Illinois. We can still call it a membership fee in Illinois, can't we? We do not have to sell our insurance in Wisconsin, do we? But if we do wish to sell our insurance in Wisconsin, we can still call our membership fee plan a membership fee plan in Illinois and elsewhere if we insist upon nomenclature, but to Wisconsin, what we collect is a premium upon which its statute operates and imposes its full burden. To assert that this is not giving extraterritorial effect to its statute is to becloud the substance of the transaction with verbiage.

Screening his real purpose, he argues that we stand the same as the employer in *Walling* v. *Helmerich & Payne*, ... U. S. ....., 89 L. Ed. 1, suggesting that our life membership fee plan is "an ingenious method to circumvent . . . the reserve requirements of the Wisconsin statute and negative the very purpose thereof" (Opp. Br. 27). He points to language in the Wisconsin Court's first opinion to the effect that to permit the plan is to put it "within the power of insurers to set their own reserve requirements by redefining 'premium' " (Opp. Br. 27). Plausible though it may seem, it is obviously untenable. In the first place, we do not define premium or fix the reserve requirements in any state. The laws of the state where the insurance is written does that and we are bound to conformance therewith as to business transacted there. Wisconsin's first opinion clearly proves this. When one considers the object and purpose of the Wisconsin statute, as defined by its Court, namely to secure appellant's "obligation to refund unearned premiums" (R. 139; 240 Wis. 161, 178) with the non-existence of obligation to refund membership fees in other states, not being there considered premiums, it is obvious that Wisconsin's statute is not and cannot be circumvented. At all times appellant must have and has a

sufficient reserve to discharge its "obligation to refund unearned premiums" wherever collected and however defined.

Let us make no mistake about his real purpose. It is to torpedo the membership fee plan everywhere, the plan which, for as much as any other reason, is responsible for appellant's successful growth and sound financial condition. This membership fee is in large part disbursed to agents as their initial commission for writing the business. Thereafter their renewal commissions are reduced in ratio similar to the practice in life insurance. In reality, we are writing automobile insurance on the life insurance plan instead of paying the same large commission yearly to agents for the mere renewal of the policy, the practice generally in automobile insurance. Under our plan, agents are paid in proportion to the work and service performed. Wisconsin seeks to wreck this plan, successfully conducted since 1922, by requiring a reserve to be set up on membership fees which have already been disbursed to agents as compensation. Under Wisconsin doctrine either the agent must work for less or appellant must supply the difference from its surplus,—must set this up as a trust fund, maintain it indefinitely, to secure a non-existent liability, thereby withdrawing it from commerce, all to the obvious burden and detriment of its policyholders. As recognized in all states, save Wisconsin, the membership fee bears no resemblance to a premium. It insures no risk. It is not returnable. Its benefits do not expire with the current term of insurance. It gives a life option to purchase insurance but it purchases none. The rights given by it are in existence even though the insurance is not in force. It occurs to us that we should think "things, not words", as Justice Holmes admonished us years ago.

(c) Appellee disregards the substance of the requirement imposed by the statute, as construed and applied, by denominating it a bookkeeping transaction.

Here Appellee asserts "this reserve is merely a bookkeeping entry, there is no segregation or trust-funding of assets for this reserve liability" (Opp. Brief, 16). If so, can Wisconsin have any interest in requiring the company to overstate its obligations and understate its assets in other states? Is this the substance underlying five years of litigation in this case? Is this the substance giving rise to the claimed Wisconsin interest? If only a bookkeeping entry is involved, then Wisconsin's claimed concern can be satisfied by simply dividing the amount of membership fees collected in any six months' or yearly period by two, thereby determining whether or not appellant "has such an asserted surplus" (Opp. Brief, 18) without the necessity of permitting Wisconsin to dictate the meaning of "premium" nationally and thereby enabling appellant to reflect its assets and liabilities truthfully and interstate commerce to continue freely.

While thus trying to minimize the effect of the Wisconsin requirement, elsewhere, in protean fashion, he asserts a different concept. His own Supreme Court to the contrary notwithstanding, he says that "the purpose of this reserve is to measure the entire future contingent liability on unexpired risks" (Opp. Brief, 14), that "this statute is a recognition by the legislature of Wisconsin that during the unexpired terms of policies the company has a risk liability" (Opp. Brief, 16). Throughout his brief, he loosely refers to the statute as one designed for the protection of Wisconsin residents. Will mere bookkeeping protect Wisconsin's residents?

Even his own authorities do not support his claim that there is no "trust-funding of assets for this reserve lia-

bility". Thus, in speaking of this reserve, Huebner in "Property Insurance", new edition 1922, regards the reserve "as a sum held in trust by the company for its policyholders" (pp. 217-218). Huebner further says that all reasons advanced for the existence of this reserve "are untenable except that which regards the reserve as consisting of a sum equal to the unearned portion of the company's premium income to be held in trust for the exclusive benefit of the policyholders" (P. 218). Messrs. Riegel & Loman in "Insurance Principles and Practices", Third Edition, 1924, say that "this reserve is a trust fund, and in that respect is very similar to the reserve held by life insurance companies" (p. 246). That reserves are trust funds in Wisconsin is conclusively demonstrated by Section 201.05(2)(e) of its statutes in dealing with the purposes for which a company may be formed, specifying that "there be maintained separate and distinct reserves in trust for each kind of insurance so written". (See App. I This reply). The Wisconsin Court in its former opinion specifically said "that reserves shall be set up against this 'premium' and that specified portions of the premium indicated in the statutory tables shall be returned as unearned upon the cancellation of the insurance". (*Duel* v. *State Farm Mutual Automobile Insurance Co.*, 240 Wis. 161, 177). This trust fund concept of an unearned premium reserve is exactly our argument. (Crobaugh, Handbook of Insurance, p. 1143; Orig. Br. 15, 23).

Is the creation of a trust fund mere bookkeeping? Is it mere bookkeeping when appellant to conform must take what absolutely belongs to it in 36 states as membership fees and on which no liability to return any part thereof attaches by virtue of contract or the laws of those states, and impress one-half of it with a trust to secure a liability non-existent? One-half of the membership fees collected in 1942 would aggregate over $815,000. Is it mere bookkeeping to so appropriate this sum from the com-

pany's free assets, freeze it to secure a non-existent liability,—property which, under the laws of those states, may be devoted to the prosecution of interstate commerce, to the payment of obligations arising in that commerce,—property which may be lawfully expended in those states for the purpose of investigating the insurability and desirability of new risks, for compensation for obtaining new business, and application to exigencies incident to the transaction of any lawful business of the company?

(d) Assuming, but not admitting, appellee's argument in all its phases, the claimed state power must yield to the superior national interest if commerce is to be free.

But assuming the Wisconsin argument that there is present here a legitimate local interest as indicated, (and this we do solely for the purpose of argument), it by no means follows and nowhere did we concede that Wisconsin in the claimed protection of such local interest could project its legislation extraterritorially. In fact we argued the opposite (Orig. Br. 19 *et seq.*) No case is cited by appellee granting such extension of power. In all the cases cited by appellee under this point (Opp. Br. 30-34), except the *Hoopeston* case (Opp. Br. 31-32), the regulations approved sought merely to regulate matters within the state. Hoopeston dealt with due process and not commerce. We concede to Wisconsin the right to define premium as it chooses on business transacted within its boundaries. But is the state interest so impelling that it compels rejectment of the competing demands of the other states, to say nothing of the national interest? Is there no room for "a little play in its joints"? Focusing consideration upon the fluid field of commerce, are we to assume that the other states are so impervious to the interests of their own citizens that the claimed local interests of one shall be projected to protect

the interests of all? As Mr. Justice Jackson pertinently observed in *Duckworth* v. *Arkansas*, 314 U. S. 390, on p. 401:

> "Our national free intercourse is never in danger of being suddenly stifled by dramatic and sweeping acts of restraint. That would produce its own antidote. Our danger, as the forefathers well knew, is from the aggregate strangling effect of a multiplicity of individually petty and diverse and local regulations. Each may serve some local purpose worthy enough by itself. Congress may very properly take into consideration local policies and dangers when it exercises its power under the commerce clause. But to let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national society. It is the movement and exchange of goods that sustain living standards, both of him who produces and of him that consumes. This vital national interest in free commerce among the states must not be jeopardized."

As we read appellee's argument, it is that if the asserted state power be not a denial of due process, "it is because the subject of regulation is sufficiently localized as to be a proper subject of exercise of the state police power" and, therefore, "a legitimate subject of local concern," and, therefore, "subject to local regulation even though it be interstate commerce provided the control exerted is not to *prohibit* interstate commerce but to "*regulate it*" (emphasis supplied) (Opp. Br., 32). Boiled down it is that if there is no denial of due process, the police power is established. Being established, interstate commerce may be "regulated" but not "prohibited," and this regardless of whether the regulation reaches out beyond the borders of the regulating state. Essentially this is Wisconsin's thesis.

Unanswered is our argument that if Wisconsin can thus project its laws beyond its borders and thereby require national conformance to them as a condition of commercial enterprise within, any one of the other states can with equal right do likewise (Orig. Br. 13). Adumbrant of such enervating effect upon commerce certain to follow from a premise so parochial in range are the retaliatory statutes of the several states, marshalled here (App. I (A); Orig. Br. 53, *et seq*), which likewise receive silent treatment. Unanswered also is our argument that Wisconsin's doctrine has "sinister implications" (Orig. Br. 23, *et seq*).

Substantially the same argument as that made by Wisconsin here was made in *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557 (Orig. Br. 19, 20), a case which likewise receives silent treatment. It was rejected there, as it should be rejected here for reasons stated by Mr. Justice Miller there (Orig. Br. 20), and for the further reason that it ignores the doctrine of this Court, namely, that the question is "whether, in each case, the competing demands of the state and national interests involved can be accommodated" (Black, J., in *U. S.* v. *S.E.U.A.*, 322 U. S. 533, 548), and for the other reasons argued in our brief (Orig. Br. 13, *et seq.*).

Due process and interstate commerce are not synonymous concepts governed by identical rules because of their obvious differences in character. Due process deals with the denial of private rights. Interstate commerce deals with public rights, national interests of impelling supreme concern. When one thinks of interstate commerce, a broad panorama opens, objectively demonstrable. Some saw it as a covered wagon, others a locomotive, yet others as an aeroplane, still others the transmission of information or an electrical impulse. It has meant manufacturing, industry, trade, and now insurance. It is so generic that

it cannot be "delineated by a simple, abstract, definition." Great judges of this Court have alluded to it metaphorically: a stream. It is no mere accident of geography or race that this nation has risen to its pre-eminent position in the world of today. As much as any other, it is because the "mutual jealousies and aggressions of the states" have been denied by the force of that great Clause, thereby assuring the free and easy flow of commerce among them. Great judges of this Court have protected that Clause from the assaults of provincial principalities. It is now too late to retreat and give effect to a doctrine which will permit the states to "go on suffocating and retarding and Balkanizing American commerce, trade and industry" (Jackson, J. in *Duckworth* v. *Arkansas*, 314 U. S. 390, 400), as they have done to the business of insurance under the concept of intrastate commerce (App. I, (A)(B); Orig. Br. 45, *et seq.*).

II.

THE STATUTE AS CONSTRUED AND APPLIED DENIES DUE PROCESS.

While the greater part of this Reply centers about the commerce clause, this is due to the extended treatment of that subject by appellee and not to the lack of importance we attach to Due Process or Full Faith and Credit. Due process, and this with all deference, receives a rather cursory treatment at his hands. Viewing the subject in the light of due process, the character and extent of appellant's activities, whether interstate or intrastate, becomes inapposite. The question under due process at bar is not one of degree or accommodation, as it is under commerce; it is one of right, whether the legislation "goes beyond any legitimate interests of the state" (Holmes, J., in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435; Orig. Br. 36, 37).

Having this principle in mind, we find that appellee again asserts his overall solvency theme (Opp. Br. 36) and concludes his argument with the inaccurate observation that appellant's "development and expenditure" in Wisconsin was "without compliance with the Wisconsin statutory regulations and while it has been operating therein under the injunctions as previously stated" (Opp. Br. 37), ignoring that appellant initially entered the state under a license permitting the use of its membership fee plan and had in Wisconsin at the time of the acts complained of herein, an administrative office, 500 agents, 25,000 risks in force, an annual premium income in excess of $400,000.00, and had expended in excess of $25,000.00 in development (Orig. Br. 29, R. 108, 109). Ignored also is the rule that thereby appellant became entitled to the protection of due process "against a subsequent application to it of State law" (*Conn. Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 80; Orig. Br. 30).

As to the overall solvency theme, we answer that it is as incongruous as the Boston Symphony playing Alexander's Rag Time Band. We repeat again that the statute serves a special limited purpose, as the Wisconsin Supreme Court twice advised us, namely, to secure the "discharge of the company's obligations to refund unearned premiums" (240 Wis. 161, 178; R. 139). Therefore, before the statute can have any application there must exist: (1) a premium; and (2) the obligation to return a part thereof as unearned,—premises nonexistent as to the subject over which Wisconsin seeks to superimpose this special limited statute. Not only that, but the subject over which it thus seeks to apply its statute relates not to Wisconsin transactions, but to transactions consummated elsewhere. It seeks to make that a premium which is not a premium by the laws of the state of occurrence. It seeks to fix a contingent liability where none exists

or could exist. Where is there here "any legitimate interest(s) of the state"? (Orig. Br. 31, *et seq.*).

Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426, which we submitted as decisive (Orig. Br. 36), is ignored. So are our other cases (Orig. Br. 33, 35, 36) except *Conn. Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77 (Orig. Br. 34). It is disposed of by the curt statement that its only relevancy "is that it did involve insurance companies," and that "all it holds is that a state may not tax a foreign corporation where neither the tax in its measure nor in its incidence was related to state transactions" (Opp. Br. 35). Are we, therefore, to assume that a state may create a contingent liability under a contract where none exists where the contract neither "in its measure nor in its incidence was related to state transactions"? We think not.

Yet, Wisconsin proposes exactly that, for, in the instant opinion, its Court said (R. 138):

> "We unquestionably decided in the former case that membership fees exacted by the company from its policyholders are a part of the premiums paid by them, and that before the company could have a license to do business in this state it had to set aside a reserve comprising fifty per cent of what it designated as premiums and fifty per cent of the membership fees, in order to meet the requirement of sec. 201.18 (1)."

That appellant was willing to comply, as to business transacted in Wisconsin, was unavailing (R. 138).

Thus, Wisconsin proposes to take money belonging to appellant in 36 other states on business transacted there, convert it into a trust fund for the benefit of policyholders to secure a "contingent" liability nonexistent anywhere, and this in the face of the provisions of contracts lawfully executed recognizing the money as the money of appellant without any liability to return a part thereof attaching

thereto (Orig. Br. 31). This trust fund must be maintained for those who by their contracts and the law of their residence have no claim thereto. Neither have any residents of Wisconsin for they paid no part of it, the "contingent" liability of the company to repay to them any moneys paid by them as premiums being amply secured by reserves set up conformably to the law of their state. Wisconsin's doctrine thus distorts the financial structure of appellant by requiring it to overstate its liabilities and understate its assets, inferentially proscribed as violative of due process by Mr. Justice Cardozo in this Court's opinion in *Am. Tel & Tel. Co.* v. *U. S.*, 299 U. S. 232, 240.

Where are Wisconsin's legitimate interests here? Isn't it idle to talk of "no attempt to exert any authority beyond the state border" (Opp. Br. 36), when words are laid aside and substance dissected and examined? We argue substance, not dialectics. How are Wisconsin's interests so affected as to give it "the power it claims" (*Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 316; Orig. Br. 36). Isn't there here present a clear absence of legitimate state interest and a clear attempt to foist Wisconsin law upon contracts which neither "in their measure nor . . . incidence" are related to Wisconsin transactions"? (Orig. Br. 35, *et seq.*).

III.

THE STATUTE AS CONSTRUED AND APPLIED VIOLATES FULL FAITH AND CREDIT.

With all deference, our argument here receives scarcely passing attention. Cases which we argued under commerce, *Baldwin* v. *Seelig*, 294 U. S. 511, and *Covington, etc.* v. *Kentucky*, 154 U. S. 204 (Orig. Br. 20, 21), are referred to here by appellee as "not remotely in point" (Opp. Br. 38). While we are compelled to admit that

they are not in point under Full Faith and Credit, not being there cited by us, we resist his statement that "these attempts were made to control what was done in other states" (Opp. Br. 38), with its obvious inference that the attempts were direct ones. Like Wisconsin here they were veiled ones. Mr. Baldwin did not object to the purchase of milk in Vermont, he did not object to its importation or consumption in New York by the importer. All he objected to was its sale there. The importer, who bought it for sale, could drink it, couldn't he? (Orig. Br. 26). The same is true of Covington (Orig. Br. 20).

But be that as it may, the basic premise of his argument is that if our "contention here were sound then the other states could not only determine and fix liabilities and rights of a company but could bind the hands of the legislature of Wisconsin so it could not effectively legislate in respect to its own affairs" (Opp. Br. 39). Conversely he claims here that Wisconsin should be permitted to do what he so strongly objects to having the other states do, namely, to fix and define premiums for business transacted elsewhere, ignoring the fact that Wisconsin is here permitted its own definition of premium as to business transacted within its borders. This is exactly where Full Faith and Credit enters.

As we argued in our original brief, all we are insisting upon is that Wisconsin accord that full faith and credit to rights created by transactions or proceedings occurring without its borders as is accorded in states of occurrence. (Compare *Sovereign Camp W. W. v. Bolin*, 305 U. S. 66, 75.) If Wisconsin is required so to do, then the others are required to do likewise, not only as to Wisconsin, but as to each other, and thereby Full Faith and Credit, "like the commerce clause" becomes "a nationally unifying force" altering the status of the states as independent foreign sovereignties "*each free to ignore rights and obligations created under the laws or established by the judi-*

cial proceedings of the others," but requiring nationwide application and acceptance of such rights (Stone, C.J., in *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 439; Orig. Br. 41).

We don't now and never did argue that this rule is inflexible (Orig. Br. 42). We agree that it should be "allowed a little play in its joints" (Opp. Br. 30). Wisconsin "may cite scripture for his purpose." Unmask Wisconsin's argument and can anything be more rigid, more mummified? It need not accord faith and credit to anyone. "The scale of decision," according to its weight, should be turned in favor of appellant (Orig. Br. 42, 43).

CONCLUSION.

Appellant is the largest exclusive writer of automobile insurance in the world (R. 54) with assets of $29,632,845.47 as of December 31, 1942. Its liabilities then were $20,637,863.07 which include a voluntary and unassigned contingency reserve of $4,000,000. Its net free surplus then available for any contingency was $8,994,982.39, which surplus it had accumulated through its sound rate structure and profitable underwriting experience since 1922, the year it began business (R. 102). Its financial position is even stronger today (Bests, Reproduction of Principal Schedules from Casualty and Surety Statements, 1944, pp. 1150-1151).

It now finds itself faced with a denial of renewal of license, ostensibly because of its refusal to comply with a Wisconsin statute which would require it to set aside a reserve as a trust fund to secure a liability non-existent. In this Court it finds the Wisconsin Insurance Commissioner disagreeing with the Wisconsin Supreme Court as to the meaning and purpose of the statute interposed to bar its future business life in that state. It also finds

that Commissioner arguing on the one hand that appellant's solvency is unknown until compliance with the statute is had (Opp. Br. 18), and, on the other, that the requirement is a mere bookkeeping transaction (Opp. Br. 16), conceding all the while that Wisconsin "has not claimed that appellant is insolvent" (Opp. Br. 18).

Necessarily, in view of appellant's financial condition, and its rise to its preeminent position in the industry, one wonders what the real purpose is. Could it conceivably be economic retaliation, rivalry, reprisal or requital (*Baldwin* v. *Seelig*, 294 U. S. 511) now riding the range of insurance? (App. I (A) (B); Orig. Br. 45, *et seq.*). What other inference is there in a case where other ample statutory authority exists in Wisconsin, as we have pointed out (*Ante*, pp. 2, 7), enabling Wisconsin to require appellant to set aside adequate reserves for all liabilities, and possess in addition thereto, a minimum surplus of $50,000.00, thereby insuring appellant's soundness, thereby protecting Wisconsin citizens with whom it seeks to continue its dealings, thereby permitting interstate commerce its free flow unburdened and thereby also observing due process and full faith and credit.

Therefore, for the reasons argued in this and in our original brief, we again respectfully submit that the judgments of the Supreme Court of Wisconsin be reversed.

Respectfully submitted,

R. M. Rieser,
Herbert H. Naujoks,
Barnabas F. Sears,
Counsel for Appellant.

Ekern, Meyers & Matthias,
Of Counsel.

Chicago, Illinois, January 8, 1945.

APPENDIX I.

Wisconsin Statutes 1943.

Sec. 204.27 *Reserve Liability.* In computing the reserve liability of casualty insurance and surety corporations the commissioner shall make such calculations as in his judgment are equitable and just to both policyholders and the company; provided, that such liability so determined shall not be less than fifty per cent of the premiums written in the company's policies.

Sec. 204.28 *Employers' Liability Reserves, Computation, Allocation, Definitions.* (1) the reserve for outstanding losses under insurance against loss or damage from accident or injuries to any person and for which the insured is liable shall be computed as follows as of the date of computation:

(a) For all liability suits being defended under policies written more than ten years prior to that date, one thousand five hundred dollars for each suit; and for more than five and less than ten years prior thereto, one thousand dollars for each suit; and for more than three and less than five years prior thereto, eight hundred and fifty dollars for each suit.

(b) For all liability policies written during the three years immediately preceding such date, such reserve shall be sixty per centum of the earned liability premiums of each of such three years less all loss and loss expense payments made under liability policies written in said years; but in any event, such reserve shall, for the first of such three years be not less than seven hundred and fifty dollars for each pending suit on said year's policies.

(c) For all compensation claims under policies written more than three years prior to such date, the present values at four per centum interest of the determined and the estimated future payments.

(d) For all compensation claims under policies written in the three years immediately preceding said date, such reserve shall be sixty-five per centum of the earned premiums of each of such three years, less all loss and loss expense payments made in connection with such claims under policies written in the corresponding years; but in any event, for the first year of such three-year period such reserve shall be not less than the present value at four per centum interest of the determined and the estimated claims under policies written during such year.

(2) (a) As used in this section, the term "earned premimums" shall include gross premiums charged on all policies, including all determined excess and additional premiums, less return premiums other than premiums returned to policyholders as dividends and less reinsurance premiums and premiums on policies canceled and less unearned premiums on policies in force. But any participating company which has charged in its premium a loading in excess of its average expense requirements shall not be required to include such loading in its earned premiums; provided, the amount of such loading is approved by the commissioner.

(b) The term "compensation" relates to all insurance providing compensation to employes for personal injuries, irrespective of fault of the employer. The term "liability" relates to all insurance except compensation insurance against loss or damage from accident to or injuries suffered by an employe or other person and for which the insured is liable.

(c) The terms "loss payment" and "loss expense payments" include all payments to claimants, payments for

medical and surgical attendance, legal expenses, salaries and expenses of investigators, adjusters and fieldmen, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employes, home office expenses, and all other payments made on account of claims, whether such payments shall be allocated to specific claims or unallocated.

(3) All unallocated liability loss expense payments made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies shall be distributed as follows: Thirty-five per centum shall be charged to the policies written in that year; forty per centum to the policies written in the preceding year; ten per centum to the policies written in the second year preceding; ten per centum to the policies written in the third year preceding; and five per centum to the policies written in the fourth year preceding, and such payments made in each of the first four calendar years in which an insurer issues liability policies shall be distributed as follows: In the first calendar year one hundred per centum shall be charged to the policies written in that year, in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year, in the third calendar year forty per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, and twenty per centum to the policies written in the second year preceding, and in the fourth calender year thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, fifteen per centum to the policies written in the second year preceding, and ten per centum to the policies written in the third year preceding, and a schedule showing such distribution shall be included in the annual statement.

(3a) All unallocated compensation loss expense payments made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed as follows: Forty per centum shall be charged to the policies written in that year, forty-five per centum to the policies written in the preceding year, ten per centum to the policies written in the second year preceding and five per centum to the policies written in the third year preceding, and such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed as follows: In the first calendar year one hundred per centum shall be charged to the policies written in that year, in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year, in the third calendar year forty-five per centum shall be charged to the policies written in that year, forty-five per centum to the policies written in the preceding year, and ten per centum to the policies written in the second year preceding and a schedule showing such distribution shall be included in the annual statement.

(4) Whenever in the judgment of the commissioner the liability or compensation loss reserves of any insurer, calculated in accordance with the foregoing provisions, are either inadequate or excessive, he may, in his discretion require or permit such insurer to set up reserves based upon estimated individual claims or such other basis as he may approve.

(5) Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the commissioner may prescribe. [*1933 c. 487 s. 155; 1937 c. 219*]

Sec. 201.05 *Stock or mutual plan; Purposes; Separate olicies; Automobile Insurance.* (1) * * *

(2) No company shall be formed for the purpose of engaging in any other kind of insurance than that specified some one of the subsections of section 201.04, or more nds of insurance than are specified in a single subsection, xcept that a company may be formed: * * *

(e) For any or all of the purposes specified in section 01.04, whether by retrocession, reinsurance, or direct insurance, provided there be maintained separate and distinct reserves in trust for each kind of insurance so ritten.

Sec. 201.18 *Reserves, basis for.* (1) * * *

(2) Where no other provision is made therefor by law, e reserves of any insurance company shall be calculated pon such basis, method and plan as shall fully provide for l liabilities, and any basis, method and plan fixed by the rder of the commissioner shall be prima facie just, reaonable and proper.

(Appendix II Follows)

INVESTMENT EXHIBIT

				Gain in Surplus	Loss in Surplus
42.	Brought forward			$3187465518	

INTEREST, DIVIDENDS AND RENTS

43.	Interest, dividends and rents received during the year, per item 30, page 2, less item 58, page 3, and less $ amortization and plus $ accrual	$7755035			
44.	Deduct interest, dividends and rents due and accrued December 31 of previous year, per item 46 of last year's exhibit	1105750			
45.	Balance	7176306			
46.	Add interest, dividends and rents due and accrued December 31 of current year, per item 38, page 4, less the sum of item 35, page 5, and item 53B, page 4	1131706			
47.	Add interest and rents paid in advance December 31 of previous year, per item 40 of last year's exhibit				
48.	Total	$8307993			
49.	Deduct interest and rents paid in advance December 31 of current year, per liability exhibit, page 5				
50.	**Gross interest, dividends and rents earned during the year**		$8307993		

INVESTMENT EXPENSES

51.	(c) Investment expenses paid during the year, per disbursement exhibit, page 3. (Attach exhibit)				
	Line 41+49 Page 3	1527905			
	1/2% Mortg. Assets	778650			
		7840655			
52.	Deduct investment expenses unpaid December 31 of previous year, per item 54 of last year's exhibit	1386300			
53.	Balance	1771355			
54.	(a) Add investment expenses unpaid December 31 of current year, per liabilities exhibit, page 5, viz:—	1750000			
55.	**Investment expenses incurred during the year**		1847355		
56.	**Net interest, dividends and rents earned during the year**			6460947	

PROFIT ON INVESTMENTS

57.	Gain from sale of ledger assets, per item 38, page 2	1046396			
58.	Gain from increase in book value of ledger assets, other than for accruals, per item 39, page 2	2747156			
59.	Gain from change in difference between book and market value during the year				
60.	Gain from other investments, viz:—(Give items and amounts)				
61.	**Profit on investments during the year**		3793552		

LOSS ON INVESTMENTS

62.	Loss from sale of ledger assets, per item 60, page 3	997073			
63.	Loss from decrease in book value of ledger assets, other than for amortization, per item 61, page 3	1357659			
64.	Loss from change in difference between book and market value during the year Canadian Assets	530000			
65.	Loss from other investments, viz:—(Give items and amounts) Depreciation on Real Estate	310314			
66.	**Loss on investments during the year**		7119316		
67.	(b) Gain from investment profit and loss items			1674236	
68.	(b) Gain from investments during the year				$13541113
69.	Total gains and losses from underwriting and investments				3996207 01

MISCELLANEOUS EXHIBIT

		Gain in Surplus	Loss in Surplus
70.	Dividends declared to stockholders during the year		
71.	Dividends declared to policyholders during the year		1669938 6
72.	Remittances from home office (gross)		
73.	Remittances to home office (gross)		
74.	Increase in special reserves + Guaranty Fund		17500000 00
75.	(a) Line 33 Page 4	3099569	
76.	" 54 " 3		676567
77.			
78.	Net (b) Loss from items 70-77		1444965432
79.	Total gains and losses in surplus during the year		3996207 01 1444965432
80.	Surplus December 31 of previous year, per item 81 of last year's exhibit		6197429 67

	[illegible]	1876130			
52.	Deduct investment expenses unpaid December 31 of previous year, per item 54 of last year's exhibit	1386300			
53.	Balance	1770355			
54.	(a) Add investment expenses unpaid December 31 of current year, per liabilities exhibit, page 5, viz:—	1750000			
55.	**Investment expenses incurred during the year**		1847035 55		
56.	**Net interest, dividends and rents earned during the year**			6460894 7	
	PROFIT ON INVESTMENTS				
57.	Gain from sale of ledger assets, per item 38, page 2	1046396			
58.	Gain from increase in book value of ledger assets, other than for accruals, per item 39, page 2	2747546			
59.	Gain from change in difference between book and market value during the year				
60.	Gain from other investments, viz:—(Give items and amounts)				
61.	**Profit on investments during the year**		3793548 7		
	LOSS ON INVESTMENTS				
62.	Loss from sale of ledger assets, per item 60, page 3	397907 3			
63.	Loss from decrease in book value of ledger assets, other than for amortization, per item 61, page 3	435760 59			
64.	Loss from change in difference between book and market value during the year. Foreign Assets	53700 00			
65.	Loss from other investments, viz:—(Give items and amounts) Depreciation on Real Estate	310394 4			
66.	**Loss on investments during the year**		1190316		
67.	(b) Gain **from investment profit and loss items**			1674516 6	
68.	(b) Gain **from investments during the year**				8135411 3
69.	Total gains and losses from underwriting and investments				3996707 01
	MISCELLANEOUS EXHIBIT		Gain in Surplus	Loss in Surplus	
70.	Dividends declared to stockholders during the year				
71.	Dividends declared to policyholders during the year			1669938 6	
72.	Remittances from home office (gross)				
73.	Remittances to home office (gross)				
74.	Increase in special reserves + Guaranty Fund			17500000	
75.	(a) Line 33 Page 4		3099569		
76.	" 54 " 3			6456 67	
77.					
78.	Net (b) Gain from items 70-77				[illegible]
79.	Total gains and losses in surplus during the year				3996707 01
80.	Surplus December 31 of previous year, per item 81 of last year's exhibit			6197496 67	
81.	Surplus December 31 of current year, per item 50, page 3			7294555 77	
82.	Increase in surplus during the year (enter in column to balance)				1097059 10
83.	Totals				3996707 01
84.	Per cent. of losses incurred to premiums earned 43.91		60.35 (Note)		
85.	Per cent. of loss adjustment expenses incurred to premiums earned 16.44				
86.	Per cent. of underwriting expenses incurred to premiums earned 27.43				
87.	Per cent. of investment expenses incurred to gross interest, dividends and rents earned 22.73				

(Note) Not in annual report. Sum of Items 84 and 85 showing total loss experience for 1942

(a) Give statement number of each item or portion thereof included herein.
(b) Write "Gain" or "Loss".
(c) Include in this item one-eighth of one per cent. of the mean invested assets; repairs, expenses and taxes on real estate; such other taxes and fees as apply to investments and personal property only; and such other items, if any, as are known to apply exclusively to the assets of the company.

SCHEDULE T– PART 1—EXHIBIT OF PREMIUMS WRITTEN
Allocated by States and Territories

(May be filed not later than March 15th)

States, etc.	Gross Premiums, Including Policy and Membership Fees, Less Return Premiums and Premiums on Policies Not Taken					Net Premiums	Dividends Paid or Credited to Policyholders, less Received on Reinsurance
	Reinsurance Assumed From			Reinsurance Ceded To			
	Direct Writings	Unauthorized Companies	Authorized Companies	Unauthorized Companies	Authorized Companies		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Alabama							
Alaska							
Arizona							
Arkansas							
California							
Colorado							
Connecticut							
Delaware							
Dist. Columbia							
Florida							
Georgia							
Hawaii							
Idaho							
Illinois							
Indiana							
Iowa							
Kansas							
Kentucky							
Louisiana							
Maine							
Maryland							
Massachusetts							
Michigan							
Minnesota							
Mississippi							
Missouri							
Montana							
Nebraska							
Nevada							
New Hampshire							
New Jersey							
New Mexico							
New York							
No. Carolina							
No. Dakota							
Ohio							
Oklahoma							
Oregon							
Pennsylvania							
Rhode Island							
So. Carolina							
So. Dakota							
Tennessee							
Texas							
Utah							
Vermont							
Virginia							
Washington							
West Virginia							
Wisconsin							
Wyoming							
Canada							
Cuba							
Porto Rico							
Philippine Is.							
Mexico							
Other foreign (Russia)							
Ontario Canada							